

NO. PD-0174-17

**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
7/7/2017
DEANA WILLIAMSON, CLERK

RICARDO ZUNIGA

APPELLANT

V.

THE STATE OF TEXAS

APPELLEE

THE STATE'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-14-00153-CR**

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COURT OF APPEALS: Eighth Court of Appeals, Honorable Chief Justice Ann Crawford McClure, Justice Yvonne T. Rodriguez, and Justice Steven L. Hughes

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case arises out of the brutal attack and killings of brothers Jose and Jesus Vargas on June 22, 2009, by a group that included several identified and confirmed members of the Barrio Azteca criminal street gang. As a result of his participation in those killings, Ricardo Zuniga (hereinafter Zuniga), appellant, was indicted for capital murder (Count I) and two counts of engaging in organized criminal activity (Counts II and III). (CR at 9-11).¹ Specifically, the two engaging-in-organized-criminal-activity (hereinafter EOCA) counts alleged that Zuniga murdered the victims as a member of a criminal street gang. (CR at 10-11). The State also filed a “Notice of Habitualization” alleging that Zuniga had been twice previously convicted of felony offenses. (CR at 72-73).

A jury found Zuniga guilty of all three counts. (RR 9 at 72-76); (CR at 214-16). The same jury then found both habitualization paragraphs to be true and assessed Zuniga’s punishment for the two EOCA counts (Counts II and III) at confinement for 60 years. (RR9 at 112-16); (CR at 224-30). Because the State did not seek the death penalty, (RR4 at 12), Zuniga’s punishment for the capital-murder charge (Count I) was set by law at confinement for life without parole.

¹ Throughout this brief, references to the appellate record will be made as follows: references to the clerk’s record will be made as “CR” and page number, and references to the reporter’s record will be made as “RR” and volume and page number.

The trial court sentenced Zuniga in accordance with the law and the jury's verdicts. (RR9 at 118-22); (CR at 239-42).

On September 21, 2016, in an unpublished opinion, the Eighth Court of Appeals affirmed Zuniga's conviction and sentence in Count I (capital murder), but reversed his convictions in Counts II and III (the EOCA counts) and rendered judgments of acquittals as to those counts. *See Zuniga v. State*, No. 08-14-00153-CR, slip op. at 21-26, 37 (Tex.App.–El Paso, Sept. 21, 2016, pet. granted)(not designated for publication). The State timely filed a motion for rehearing on October 6, 2016. And on January 25, 2017, the Eighth Court of Appeals denied the State's motion for rehearing without opinion.

The State timely filed its petition for discretionary review (PDR) on February 22, 2017. This Court granted the State's PDR on June 7, 2017, with the notation that oral argument will not be permitted.

GROUND FOR REVIEW

In holding the evidence legally insufficient to support the defendant's convictions for engaging in organized criminal activity, specifically, that the State failed to prove that the defendant committed the predicate murders as a member of a criminal street gang, the Court of Appeals improperly required proof of the motive of the gang itself. Even after recognizing that the evidence showed that the defendant and his fellow gang members acted in concert in killing the victims, the Court of Appeals nevertheless improperly held that absent proof of why the gang attacked and killed the victims, the evidence was insufficient to allow the jury to rationally conclude that the killings were a gang activity and that the defendant participated in the killings as a member of the gang.

STATEMENT OF FACTS

The issue before this Court is the sufficiency of evidence proving that Zuniga committed the murders of brothers Jose and Jesus Vargas “as a member of a criminal street gang.” And the facts relevant to this sufficiency-of-evidence issue are, for the most part, accurately set out in the Court of Appeals’ opinion, *see Zuniga v. State*, slip op. at 2-8, as detailed below.

Gang turf

The Barrio Aztecas are a notoriously violent gang whose members are involved in all manner of criminal activity, including narcotics trafficking, extortion, murder, arson, explosives, kidnapping, torture, robbery, assault, burglary, etc. (RR8 at 84-85); *Zuniga v. State*, slip op. at 2. Due to the structure and activities of the gang, the Barrio Aztecas qualify as a “criminal street gang” for purposes of the EOCA statutes. (RR8 at 85-86, 112).²

The Barrio Aztecas claim the entire El Paso-Juarez region as their “turf,” or exclusive territory. (RR8 at 96-97). Thus, if another, “lesser” gang or individual sells narcotics or otherwise engages in illicit business in this region, such gang or individual is required to pay a “cuota,” or percentage, of their illicit revenue to the

² *See* TEX. PENAL CODE §71.01(d) (“‘Criminal street gang’ means three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.”).

Barrio Aztecas. (RR8 at 96-97); *Zuniga v. State*, slip op. at 2. This cuota was also described as extortion money. (RR8 at 96); *Zuniga v. State*, slip op. at 2. And if that lesser gang or individual refused or failed to pay the required cuota, the Barrio Aztecas would enforce discipline on that gang or individual, which could be as severe as killing the individual who failed or refused to pay the required cuota. (RR8 at 97); *Zuniga v. State*, slip op. at 2.

Zuniga, who was also known by the nicknames “Enano” or “Nano,” was a confirmed Barrio Azteca member. (RR6 at 71-72, 131, 206-07); (RR7 at 23, 175-81, 184-85); (RR8 at 91-92); *Zuniga v. State*, slip op. at 3. Similarly, Victor “Nacho” Gomez, Joe Cordero, and Jose Alarcon (other individuals who participated with Zuniga in the killings of Jose and Jesus Vargas), were also confirmed Barrio Azteca members. (RR6 at 73-75); (RR8 at 91-95); *Zuniga v. State*, slip op. at 3.

The two victims, Jose and Jesus Vargas, were members of the Barrio Campestre Locos, a “traditional, old-school” regional criminal street gang from the Campestre area of Socorro, Texas. (RR8 at 95-96); *Zuniga v. State*, slip op. at 3. The Barrio Campestre Locos were likewise involved in all manner of criminal activity in the Socorro area (within the Barrio Azteca’s “turf”), including narcotics trafficking. (RR8 at 96); *Zuniga v. State*, slip op. at 3.

The eyewitnesses to the killing of the Vargas brothers by Zuniga and his fellow Barrio Azteca gang members at the A&M Bar

Aide Samaniego

Aide Samaniego was at the A&M Bar late in the evening on June 21, 2009. (RR6 at 126-27). Two of the confirmed Barrio Azteca members noted above, Zuniga and Jose Cordero (who was a childhood friend of Samaniego) joined Samaniego at her table in the bar. (RR6 at 128-29, 140); *Zuniga v. State*, slip op. at 3. At approximately 11:30 pm or midnight, Zuniga and Cordero left the table, engaged in a confrontation with another group of individuals near the entrance to the bar, and then returned to the table. (RR6 at 131-32); *Zuniga v. State*, slip op. at 3. Later, Samaniego stepped outside the bar to smoke a cigarette, and she saw three men, whom she described as “gangsters” or “cholos,” join Zuniga and Cordero. (RR6 at 132, 160); *Zuniga v. State*, slip op. at 3. Zuniga, Cordero, and those other “gangsters” then exited the bar. (RR6 at 132, 160); *Zuniga v. State*, slip op. at 3.

Samaniego then saw that a fight had started outside the bar, and she testified that a group of 10-15 people, including Cordero, were punching and kicking two individuals, who were on the ground and unable to defend themselves. (RR6 at 132-33, 170, 196); *Zuniga v. State*, slip op. at 3-4. During this fight, somebody

yelled out, “Cops,” and everybody started to scatter. (RR6 at 133); *Zuniga v. State*, slip op. at 4. And although Samaniego did not see Zuniga involved in the initial beating of the two individuals, (RR6 at 196-97), she saw Zuniga and another person get into a vehicle in the parking lot. (RR6 at 133); *Zuniga v. State*, slip op. at 4. Somebody threw a bottle that broke a window on that vehicle, and Samaniego saw Zuniga get out of the vehicle, open the trunk, and pull out a gun. (RR6 at 133); *Zuniga v. State*, slip op. at 4. Samaniego then saw Zuniga walking back toward the fight scene with the gun in his hand, holding it sideways and pointed in front of him as he walked, and she began to run to her car. (RR6 at 133-34, 182-84, 199); *Zuniga v. State*, slip op. at 4. As she was running away, Samaniego heard two gunshots. (RR6 at 134); *Zuniga v. State*, slip op. at 4. But she did not actually see anyone shoot anybody. (RR6 at 185).

A few days after the incident, Samaniego identified Zuniga, Cordero, and Gomez (Nacho) in photo line-ups as persons who were in the group of individuals who assaulted and ultimately murdered the two victims in this case. (RR6 at 135-40); (SX198); *Zuniga v. State*, slip op. at 4.

Cecilia Estrada

Cecilia Estrada arrived at the A&M Bar at approximately 10:00 or 11:00 pm. (RR6 at 206). She saw her friend, Aide Samaniego, sitting at a table with

Cordero and Zuniga. (RR6 at 206-09); *Zuniga v. State*, slip op. at 4. When the fight broke out outside the bar, Estrada ran outside and saw a group of 5-7 men, including both Zuniga and Cordero, beating and kicking someone on the ground. (RR6 at 209-10); *Zuniga v. State*, slip op. at 4-5. As she ran away, Estrada heard two gunshots, and when she turned back to look at the fight scene, she saw Zuniga with a gun in his hand. (RR6 at 210-15); *Zuniga v. State*, slip op. at 5. She did not actually see the shooting, however. (RR6 at 254); *Zuniga v. State*, slip op. at 5.

Two days after the incident, Estrada identified Zuniga and Cordero by name in photo line-ups. (RR6 at 221-26); *Zuniga v. State*, slip op. at 5. And she specifically testified that the person she identified as “Nano” (Zuniga) in the photo line-up was the person she saw holding a gun immediately after she heard the two gunshots. (RR6 at 226); *Zuniga v. State*, slip op. at 5.

Flor Reyes

Flor Reyes, the A&M Bar bartender, identified Zuniga in court and testified that he was at the bar the night of the murders. (RR6 at 23-24); *Zuniga v. State*, slip op. at 5. That night (before the fight and killings), Reyes heard Zuniga tell someone named Sparky that he (Sparky) had to do his job, but that Sparky had said no. (RR7 at 31-33, 82); *Zuniga v. State*, slip op. at 5.

When the fight broke out, several people rushed in the bar and told Reyes to

call the police. (RR7 at 51-52); *Zuniga v. State*, slip op. at 5. She then ran outside and saw one of the Vargas brothers on the ground. (RR7 at 24); *Zuniga v. State*, slip op. at 5. Several other bystanders were attempting to help the victims, but Zuniga and 3-4 others were keeping those bystanders at bay by pointing and waving guns at them and telling them “not to get close.” (RR7 at 39-41, 54-55, 80, 84); *Zuniga v. State*, slip op. at 5.

As Reyes approached one of the Vargas brothers, she heard Cordero yell out to “[shoot] at him some more” or “finish him off,” (RR7 at 24, 34-38), and Zuniga then shoved her back and shot that Vargas brother in the head. (RR7 at 25, 27, 41, 59-62); *Zuniga v. State*, slip op. at 5-6. After Zuniga shot this victim in the head, he (Zuniga) then fired two more shots into that victim’s back, for a total of three shots. (RR7 at 41, 58-62); *Zuniga v. State*, slip op. at 6. Reyes was absolutely positive it was Zuniga who she saw shoot that victim. (RR7 at 61-62). After shooting that victim, Zuniga just walked away, got into a vehicle, and left. (RR7 at 25).³ Reyes did not see anyone other than Zuniga fire a gun, and the three gunshots she saw and heard Zuniga fire were the only gunshots she heard. (RR7 at 27-28); *Zuniga v. State*, slip op. at 6.

³ After the killings, Zuniga fled to Mexico, where he was not apprehended until 2012. (RR6 at 56); (RR7 at 160-71, 223); (RR8 at 108-12).

Reyes identified Zuniga, Gomez (Nacho), and Cordero in photo line-ups as being involved in the murders. (RR7 at 25-31); (SX200a, 200b, 200c); *Zuniga v. State*, slip op. at 6. And she specifically identified Zuniga in court as the shooter. *Zuniga v. State*, slip op. at 6.

The motive evidence

Detective Gibson

Detective Jeffrey Gibson was qualified as an expert on local gangs and the operations of those local gangs. (RR8 at 69-77); *Zuniga v. State*, slip op. at 8. Det. Gibson explained that the A&M Bar was a known hangout for Barrio Azteca members and others engaged in narcotics trafficking. (RR8 at 90-91); *Zuniga v. State*, slip op. at 8. He also explained that the victims' gang, the Barrio Campestre Locos, was likewise involved in selling drugs in this area. (RR8 at 95-96); *Zuniga v. State*, slip op. at 8. And after explaining the Barrio Aztecas' demand for and collection of cuotas, as discussed above, Det. Gibson testified that in his expert opinion, the attack against the Vargas brothers was consistent with Barrio Azteca activities. (RR8 at 122); *Zuniga v. State*, slip op. at 8.

The excluded evidence

Before opening statements at trial, the prosecutor informed the trial court that the State intended to elicit evidence that the motive for the killings of the

Vargas brothers was their failure to pay the required cuota to the Barrio Aztecas for selling drugs and to discuss that motive during its opening statement to the jury. (RR6 at 12); *Zuniga v. State*, slip op. at 8. Zuniga objected that the State's evidence proving such motive was inadmissible hearsay. (RR6 at 12-17); *Zuniga v. State*, slip op. at 8. The trial court ruled that the State would not be allowed to mention the motive during its opening statement. (RR6 at 12-17); *Zuniga v. State*, slip op. at 8.

During the State's case-in-chief, the prosecutor called witness Ramon Orozco to testify as to statements one of the deceased victims made to him on the date of the attack. (RR8 at 20-21); *Zuniga v. State*, slip op. at 8. Specifically, the prosecutor noted that Orozco would testify that he bought cocaine from one of the victims ("Froggy") earlier that day, and Froggy told him that he (Froggy) was having trouble with the Barrio Aztecas because he was not paying his cuota. (RR8 at 21-22); *Zuniga v. State*, slip op. at 8. Froggy told Orozco that he (Froggy) was planning on going to the A&M Bar later that night, and Orozco told Froggy to be careful. (RR8 at 22). Zuniga again objected that Froggy's statements to Orozco were inadmissible hearsay, and after extensive discussion, the trial court ruled that the State would not be allowed to elicit from Orozco any of the statements Froggy made to him the day of the murders. (RR8 at 22-26); *Zuniga v. State*, slip op. at 8,

25.

Summary of the evidence

In summary, when properly viewed in the light most favorable to the jury's verdicts, and as recognized by the Court of Appeals, the evidence at trial showed that a group of people, acting in concert, savagely beat, kicked, punched, stabbed, and ultimately shot and killed Jose and Jesus Vargas in the parking lot of a bar. *See Zuniga v. State*, slip op. at 3-6. Zuniga and at least three of the other active participants in the killings were identified and confirmed Barrio Azteca gang members. *See id.* The evidence also showed that not only did those Barrio Azteca members act in concert in carrying out the killings, but also that it was a coordinated effort by those gang members. *See, e.g.*, (RR7 at 39-41, 54-55, 80, 84 – where one eyewitness testified that Zuniga and other gang members were keeping bystanders from helping the victims by pointing and waving guns at the bystanders and telling them “not to get close”); (RR7 at 24-25, 27, 34-38, 41, 59-62 – where that same witness testified that as one of the victims was lying on the ground, one of the other Barrio Azteca members yelled out to Zuniga to “[shoot] at him some more” or to “finish him off,” whereupon Zuniga fired one or more shots into that victim); *Zuniga v. State*, slip op. at 5-6.

In addition, a witness qualified and accepted by the trial court as an expert

on local gangs and the operations of those local gangs testified that the Barrio Aztecas claim the El Paso-Juarez region as their “turf,” such that if any other lesser gang or individual sells narcotics or otherwise engages in illicit business in this area, such gang or individual is required to pay a cuota to the Barrio Aztecas. (RR8 at 96-97); *Zuniga v. State*, slip op. at 2, 8. And if the gang or individual refused or failed to pay the cuota, the Barrio Aztecas would enforce discipline on the gang or individual, which could be as severe as killing the individual who failed or refused to pay the required cuota. (RR8 at 97); *Zuniga v. State*, slip op. at 2.

The State attempted to demonstrate, through statements one of the Vargas brothers had earlier made to a witness on the day of the murders, that Zuniga and the other Barrio Aztecas attacked and killed the Vargas brothers because they (the Vargas brothers) had failed to pay their cuota to the Barrio Aztecas for selling drugs in Barrio Azteca territory. (RR6 at 12-17); (RR8 at 21-26). But due to various evidentiary rulings by the trial court, the State was precluded from presenting any evidence to the jury regarding this specific, alleged drug-cuota motive for the killings. (RR8 at 21-26); *Zuniga v. State*, slip op. at 8-9, 25. Nevertheless, the State’s gang expert testified that the murders of the Vargas brothers were consistent with Barrio Azteca gang activity. (RR8 at 122); *Zuniga*

v. *State*, slip op. at 26.

The jury charge and arguments of the parties

Although the two EOCA counts in the indictment alleged that Zuniga committed the murders “as a member of a criminal street gang,” (CR at 10-11), the trial court instructed the jurors in the charge that the State was required to prove that Zuniga committed the murders, “with the intent to establish, maintain, or participate as a member of a criminal street gang.” (CR at 207 – definition of EOCA offense); (CR at 210 – application paragraphs for the two EOCA counts). The court then specifically instructed the jurors that the State was required to prove that Zuniga “participated as a member of the Barrio Azteca criminal street gang.” (CR at 210).

Zuniga argued to the jury that the “big question” in the case was “the gang thing,” that is, whether the murders had anything to do with Barrio Azteca business. (RR9 at 25). The prosecutor responded that because Zuniga and at least two or three other confirmed Barrio Azteca members were actively involved in the killings, that evidence showed that this was a gang activity and that Zuniga had participated in the murders as a member of the Barrio Aztecas. (RR9 at 69).

SUMMARY OF THE STATE'S ARGUMENT

To satisfy the elements of the type of EOCA offense charged in this case, the State was required to prove that Zuniga committed the predicate murders “as a member of a criminal street gang.” And the evidence in this case, when properly viewed in the light most favorable to the jury’s verdicts (and as so recognized by the Court of Appeals), showed that Zuniga and a group of his fellow Barrio Azteca criminal-street-gang members, acting in concert and in a coordinated effort, savagely attacked and killed Jose and Jesus Vargas. Zuniga’s participation alongside and in concert with his fellow gang members in carrying out the brutal, coordinated attack was thus sufficient to demonstrate his intent to commit the murders as a member of the Barrio Azteca gang.

But in analyzing the sufficiency of evidence in this regard, the Court of Appeals erroneously concluded that because the State was unable to prove why Zuniga and his fellow gang members attacked and killed the victims, the evidence was insufficient to prove that Zuniga committed the murders as a member of a criminal street gang. This analysis and holding, in effect if not explicitly, required the State to prove the motive of the gang itself in attacking and killing the victims in order to prove Zuniga’s intent to commit those predicate murders as a member of the gang. This is not, and never has been, the law in Texas.

ARGUMENT AND AUTHORITIES

In holding the evidence legally insufficient to support the defendant's convictions for engaging in organized criminal activity, specifically, that the State failed to prove that the defendant committed the predicate murders as a member of a criminal street gang, the Court of Appeals improperly required proof of the motive of the gang itself. Even after recognizing that the evidence showed that the defendant and his fellow gang members acted in concert in killing the victims, the Court of Appeals nevertheless improperly held that absent proof of why the gang attacked and killed the victims, the evidence was insufficient to allow the jury to rationally conclude that the killings were a gang activity and that the defendant participated in the killings as a member of the gang.

I. The evidence at trial, as so found by the Court of Appeals, demonstrates that a group of Barrio Azteca gang members, including Zuniga, acted in concert and in a coordinated effort in killing the Vargas brothers.

As the Court of Appeals expressly recognized and held, the evidence at trial, as discussed above, showed and established that Zuniga and a group of his fellow Barrio Azteca gang members acted in concert in killing the Vargas brothers:

...a rational trier of fact could have reasonably concluded that [Zuniga] acted with the intent to promote and assist in the commission of the murders of the Vargas brothers...and he directed, encouraged, and aided his fellow gang members' commission of the assault, ultimately killing the two brothers. *See Zuniga v. State*, slip op. at 19.

...This evidence only establishes that [Zuniga] was a confirmed member of the Barrio Aztecas and that he committed the offense of capital murder, along with other Barrio Azteca members. *See Zuniga v. State*, slip op. at 26.

But even though the Court of Appeals so acknowledged that the State had proved

that Zuniga acted in concert with his fellow Barrio Azteca gang members in a coordinated effort in killing the Vargas brothers, the Court nevertheless concluded that because the State was unable to prove *why* Zuniga and his fellow gang members attacked and killed the Vargas brothers, the evidence was legally insufficient to prove that Zuniga had the requisite intent to commit the offense as a member of a criminal street gang. *See Zuniga v. State*, slip op. at 24-26. The flaw in this final conclusion by the Court of Appeals is that it requires the State to prove an additional mental-state element not required by the EOCA statutes, that is, it requires the State to prove not only that Zuniga acted in concert with his fellow gang members in attacking and killing the Vargas brothers, but also *why* Zuniga and his fellow gang members wanted to kill them, in order to prove Zuniga's intent to commit the offense as a Barrio Azteca gang member.

II. Neither the engaging-in-organized-criminal-activity statutes nor *Hart v. State* requires the State to prove why the criminal street gang wanted to kill the victims.

A. Section 71.02 of the Penal Code and *Hart v. State*

Section 71.02 of the Texas Penal Code provides that a person commits the offense of EOCA “if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, the person commits [one of the listed predicate offenses, including capital

murder].” *See* TEX. PENAL CODE §71.02(a). And this Court has interpreted this provision, at least as far as it applies to the “combination” form of EOCA (as opposed to the “criminal street gang” form alleged in this case), to require proof of two mental states: (1) the intent to commit the predicate offense; and (2) the intent to establish, maintain, participate in, or participate in the profits of, a combination. *See Hart v. State*, 89 S.W.3d 61, 63 (Tex.Crim.App. 2002).

B. The Court of Appeals’ application of the *Hart* holding to the “criminal street gang” form of engaging in organized criminal activity is not technically, or grammatically, correct.

In this case, the Court of Appeals extended the *Hart* holding, as it relates to the requirement of the two mental states in a prosecution for the “combination” form of EOCA, to a prosecution for the “criminal street gang” form of EOCA as well, thereby similarly requiring the State to prove two mental states as they relate to Zuniga’s participation in the murders as a member of a criminal street gang: “The State must prove not only that the defendant is a member of a criminal street gang and committed one of the enumerated offenses; the evidence must support a finding that the defendant intended to establish, maintain, or participate [as a member of a criminal street gang].” *See Zuniga v. State*, slip op. at 23 (parenthetical in original), *citing Hart v. State, supra*.

However, based on the grammatical structure of §71.02(a), the State

contends that the “with intent to establish, maintain, or participate” language therein applies only to the “combination” form of EOCA and not to the “criminal street gang” form, as it does not make grammatical sense to require proof of the intent to “establish as a member of a criminal street gang,” or proof of the intent to “maintain as a member of a criminal street gang,” which would be the result if the “with intent to establish, maintain, or participate” language applies to the “criminal street gang” form of EOCA. *See* TEX. GOV’T CODE §311.011(a) (provision of Code Construction Act providing that words and phrases in a statute should be “read in context and construed according to the rules of grammar and common usage”); *see also Prichard v. State*, ___ S.W.3d ___, No. PD-0712-16, 2017 WL 2791524, at *3 (Tex.Crim.App., June 28, 2017)(not yet reported); *Arteaga v. State*, ___ S.W.3d ___, No. PD-1648-15, 2017 WL 2457432, at *3-4 (Tex.Crim.App., June 7, 2017)(not yet reported) (cases where this Court noted that statutes should be construed in accordance with rules of grammar). Because the “as a member of a criminal street gang” phrase does not fit, grammatically, with the “with the intent to establish, maintain, or participate” clause of §71.02(a), “as a member of a criminal street gang” is thus a stand-alone phrase describing the second required culpable mental state in a prosecution for this type of EOCA offense. *See D.A. and M.A. v. Texas Health Presbyterian Hosp.*, 514 S.W.3d 431,

434-39 (Tex.App.–Fort Worth 2017, pet. filed)(explaining that a statute will not ordinarily be construed so as to result in a grammatically illogical result). As such, due to these grammatical limitations, §71.02(a), as it defines the “criminal street gang” form of EOCA, should be read to define the offense as follows: “A person commits an offense if, ...as a member of a criminal street gang, the person commits [one of the listed predicate offenses].” See TEX. PENAL CODE §71.02(a).⁴

At first blush, this might appear to be a mere semantical distinction without a difference, as even this proper grammatical reading of the statute does not result in a practical difference from the holding in *Hart* regarding proof of the required mental states. Properly requiring proof that the defendant committed the predicate offense “*as a member* of a criminal street gang” requires the State to prove a similar, second culpable mental state as the required second mental state described in *Hart* in regard to the “combination” form of EOCA, that is, that the defendant intended to participate as a gang member when he committed the offense. As such, even under the Court of Appeals’ grammatically dubious interpretation of §71.02(a), there should be no real practical difference in the required proof of a

⁴ That is how the two EOCA counts were alleged in the indictment in this case. (CR at 10-11).

second culpable mental state in the “criminal street gang” form of EOCA.⁵

C. The Court of Appeals improperly required proof of the gang’s motive in order for the State to have sufficiently proved Zuniga’s intent to commit the murders as a member of the Barrio Azteca criminal street gang.

Regardless of whether the Court of Appeals’ grammatically erroneous extension of *Hart* to the “criminal street gang” form of EOCA had any bearing on its sufficiency-of-evidence analysis, the ultimate error in the Court of Appeals’ analysis of the sufficiency of evidence supporting Zuniga’s convictions for EOCA is that the Court of Appeals has, in effect, required the State to prove yet a third mental state not required by §71.02(a) nor contemplated by this Court’s reasoning in *Hart*, namely, the mental state, intent, or motive of the gang itself, in order to sufficiently prove Zuniga’s intent to commit the murders as a member of the Barrio Aztecas. Thus, while the State agrees that it is not sufficient merely to prove that Zuniga was a member of the Barrio Aztecas (a criminal street gang) and

⁵ Where the Court of Appeals’ grammatically incorrect extension of *Hart* to require proof of the defendant’s intent “to establish, maintain, or participate [as a member of a criminal street gang]” in committing the predicate offense may cause some confusion is the manner in which the jury should be properly charged in a “criminal street gang” EOCA prosecution. Similar to the EOCA indictments in this case, which properly tracked the logical grammatical structure of §71.02(a), the jury charge should authorize the jury to convict upon sufficient proof that the defendant committed the predicate offense “as a member of a criminal street gang.” Such a proper jury charge would perhaps have prevented the apparent confusion by the Court of Appeals as to what constitutes sufficient proof of this second culpable mental state, as will be discussed below.

that he committed the offense of capital murder, the State was properly required to additionally prove only that Zuniga committed the capital-murder offense “*as a member of a criminal street gang*” and was not required to further prove why Zuniga and his fellow Barrio Aztecas killed the Vargas brothers.

As noted above, the Court of Appeals expressly recognized and held that the evidence at trial showed and established that Zuniga and a group of his fellow Barrio Azteca gang members acted in concert and in a coordinated effort in attacking and killing the Vargas brothers:

...a rational trier of fact could have reasonably concluded that [Zuniga] acted with the intent to promote and assist in the commission of the murders of the Vargas brothers...and he directed, encouraged, and aided his fellow gang members’ commission of the assault, ultimately killing the two brothers. *See Zuniga v. State*, slip op. at 19.

...This evidence only establishes that [Zuniga] was a confirmed member of the Barrio Aztecas and that he committed the offense of capital murder, along with other Barrio Azteca members. *See Zuniga v. State*, slip op. at 26.

This evidence, as so found by the Court of Appeals, demonstrates that Zuniga’s participation in the killings was not merely the independent impulse or conduct of a rogue gang member pursuing his own personal criminal agenda.⁶ Rather, this

⁶ As one example of a failure of proof of the second required culpable mental state, suppose the State alleged an EOCA offense with aggravated assault as the underlying offense, and the evidence at trial showed that the defendant, a confirmed member of a criminal street gang, committed an act of road rage and tried to run the victim’s vehicle off the road after the victim cut him off in traffic. Has the State proved an EOCA offense? No. Nothing in this evidence suggests, or would support an inference, that the road-rage incident was a gang activity

evidence shows that Zuniga and his fellow gang members decided to attack and kill the Vargas brothers at the bar that night, and they acted together as a gang in carrying out that decision. Simply, this was a gang activity, and Zuniga intended to participate as a member of the gang when he joined in (or even directed) the coordinated efforts of his fellow gang members in attacking and killing the Vargas brothers.⁷

or that the defendant committed the offense *as a member* of a criminal street gang. Instead, this evidence suggests only that this was the independent impulse or conduct of a rogue gang member pursuing his own personal criminal agenda.

⁷ To any extent the Court of Appeals may have concluded that the evidence was insufficient to prove Zuniga's intent to commit the offense as a member of the Barrio Aztecas because, due to the trial court's exclusion of the State's direct evidence of the gang's actual motive for killing the Vargas brothers that night, there could have been any number of possible reasons (wholly unrelated to any "official" Barrio Azteca function) why Zuniga and his fellow gang members carried out their brutal attack, such conclusion is an inappropriate application of the long-disavowed alternate-reasonable-hypothesis construct for measuring sufficiency of the evidence. Simply, while there may have been some non-gang-related reason for Zuniga and his fellow gang members to attack and kill the Vargas brothers, it could also be reasonably inferred from the evidence showing a coordinated effort by the gang members in carrying out the attack that it was, in fact, a gang activity. *See Laster v. State*, 275 S.W.3d 512, 522-23 (Tex.Crim.App. 2014)("As long as the verdict is supported by a reasonable inference, it is within the province of the factfinder to choose which inference is most reasonable."); *see also Merritt v. State*, 368 S.W.3d 516, 525-26 (Tex.Crim.App. 2012)("When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict and defer to that determination."); *cf. Villa v. State*, 514 S.W.3d 227, 230-33 (Tex.Crim.App. 2017)(where this Court, in another EOCA case, implicitly rejected the Court of Appeals' utilization of a similar alternate-reasonable-hypothesis construct for measuring sufficiency of the evidence proving the defendant's gang membership). Moreover, that some of the assailants involved in the attack with Zuniga and the other named Barrio Azteca members were not specifically named or identified as Barrio Azteca members does not detract from, or preclude, the reasonable inference that all of the attackers were gang members and/or that the attack was a gang activity. *See Villa v. State*, 514 S.W.3d at 232-33 (where this Court held that evidence naming and identifying some of the victim's attackers as gang members, while some of the attackers were left unidentified, was sufficient to allow a reasonable inference that all of the attackers were fellow gang members of

In creating an increased punishment range for an EOCA offense above the range for the predicate offense, the Texas Legislature recognized that coordinated efforts of organized criminal gangs is more dangerous to the welfare of the community than ordinary criminal activity. *See Frescas v. State*, No. 08-98-00325-CR, 2000 WL 775060, at *4 (Tex.App.–El Paso, June 15, 2000, pet. ref’d)(not designated for publication), *citing McDonald v. State*, 692 S.W.2d 169, 172 (Tex.App.–Houston [1st Dist.] 1985, pet. ref’d). The essential, aggravating element of the EOCA offense, then, is the defendant’s participation in the predicate offense “as a member of a criminal street gang,” not the gang’s motive in committing the particular predicate offense.

But, again, even though the Court of Appeals held the evidence sufficient to show that Zuniga acted together with his fellow gang members in killing the Vargas brothers, the Court nevertheless held the evidence insufficient to support a finding that Zuniga committed the offense as a member of the gang due to the State’s inability to prove why the gang killed the Vargas brothers. However, the law doesn’t care why the Barrio Aztecas wanted to kill the Vargas brothers, nor does it require proof of such motive of the gang. All the law requires is proof that Zuniga committed the murders as a member of the gang, and the evidence (as so

the defendant).

found by the Court of Appeals) showing the joint, coordinated efforts of Zuniga and his fellow gang members is more than sufficient to support a finding that this was a Barrio Azteca killing.⁸

III. Conclusion

In sum, contrary to the Court of Appeals' opinion, the State's inability in this case to prove exactly why Zuniga and the rest of his fellow Barrio Azteca gang members decided to attack and kill the Vargas brothers does not render the evidence legally insufficient to prove that it was a gang activity and that Zuniga participated as a member of the gang. All the State was required to prove were the two mental-state elements as described in *Hart*, that is: (1) that Zuniga intended to cause the deaths of the two victims; and (2) that he participated in the murders as a member of the Barrio Aztecas. And as the Court of Appeals expressly recognized

⁸ As the State noted in its brief in the Court of Appeals, motive is not an element of murder that the State is ordinarily required to prove. *See Clayton v. State*, 235 S.W.3d 772, 781 (Tex.Crim.App. 2007). However, evidence of motive can be highly probative of the identity and/or intent elements in a murder case. *See id.* And that is why the State attempted to prove the gang's drug-cuota motive in this case. Evidence of this drug-cuota motive would have been the icing on the cake as far as proving that the killing of the Vargas brothers was indeed an "official" Barrio Azteca gang activity. *See Zuniga v. State*, slip op. at 24-25 (where the Court of Appeals noted that in the previous trial of one of Zuniga's co-defendants [Gomez] in the Vargas brothers' murders, the State was able to prove the Barrio Aztecas' motive for killing the Vargas brothers); *see also Gomez v. State*, No. 08-12-00001-CR, 2014 WL 3408382 (Tex.App.-El Paso, July 11, 2014, no pet.)(not designated for publication). But the absence of any such direct motive evidence in this case did not render the evidence legally insufficient to support a finding that the killing was a gang activity. Again, regardless of why the Barrio Aztecas killed the Vargas brothers, the fact that they did it as an organized criminal street gang satisfies all of the required elements of EOCA.

in its opinion, the State did in fact prove that the Barrio Azteca gang members (including Zuniga) acted together and in a coordinated manner in attacking and killing the Vargas brothers that night:

...a rational trier of fact could have reasonably concluded that [Zuniga] acted with the intent to promote and assist in the commission of the murders of the Vargas brothers...and he directed, encouraged, and aided his fellow gang members' commission of the assault, ultimately killing the two brothers. *See Zuniga v. State*, slip op. at 19.

...This evidence only establishes that [Zuniga] was a confirmed member of the Barrio Aztecas and that he committed the offense of capital murder, along with other Barrio Azteca members. *See Zuniga v. State*, slip op. at 26.

Consequently, the evidence (including the gang expert's testimony that the murders were consistent with Barrio Azteca activity) was sufficient to support the conclusion that the attack on the Vargas brothers was a coordinated gang activity and that Zuniga committed the offense as a member of the gang, such that the evidence was likewise sufficient to prove both of the mental-state requirements of the EOCA statutes as explained in *Hart*. The Court of Appeals thus erred in concluding that the evidence was not legally sufficient to support Zuniga's convictions for EOCA in Counts II and III of the indictment.

For all of these reasons, this Court should reverse the judgment of the Court of Appeals as to Counts II and III, hold the evidence legally sufficient to support Zuniga's convictions for engaging in organized criminal activity in Counts II and

III, and affirm Zuniga's convictions for engaging in organized criminal activity in Counts II and III.

PRAYER

WHEREFORE, the State prays that this Court reverse the judgment of the Court of Appeals as to Counts II and III, hold the evidence legally sufficient to support Zuniga's convictions for engaging in organized criminal activity in Counts II and III, and affirm Zuniga's convictions for engaging in organized criminal activity in Counts II and III.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the statement of facts on page 1 through and including the prayer for relief on page 24, contains 6,287 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Tom A. Darnold

TOM A. DARNOLD

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on July 6, 2017, a copy of the foregoing petition for discretionary review was sent by e-mail by utilizing the E-serve system to appellant's attorney: Ruben P. Morales, at rbnpmrls@gmail.com.

(2) The undersigned also does hereby certify that on July 6, 2017, a copy of the foregoing petition for discretionary review was sent by e-mail by utilizing the E-serve system to the State Prosecuting Attorney: information@SPA.texas.gov.

/s/ Tom A. Darnold

TOM A. DARNOLD